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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 874

NELSON H. LEO, doing business as OVERSEAS ASSOCIATED CORPORATION,

Respondent,

—against—

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Petitioner.

REPLY BRIEF FOR PETITIONER

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The petition herein raises only questions of law. The manner in which the ruling of the Court of Appeals in the instant case conflicts with prior holdings of this Court, other Courts of Appeals, and English Courts is supported by numerous references to, and quotations from, applicable opinions.

The respondent in its brief in opposition to the petition has cited not a single authority on any subject; nor has it questioned the validity of any authority relied upon by the petitioner. It has simply submitted an inflated and unnecessary narrative in the hope of convincing this Court that there are no questions of law involved in this petition.

The Trial Judge's comment in the presence of the jury that the defendant's basic position was that it did not want to pay the money deprived petitioner of the fair, impartial trial by jury guaranteed to all litigants, large or small, corporate or individual.

The respondent in its brief in opposition to the petition tries to excuse the statement of the Trial Judge in the presence of the jury, that defendant's basic position was that it did not want to pay the money, by alleging that the remark "was obviously intended humorously" (Resp. brief, p. 7).

The petitioner specifically called upon the respondent to indicate for this Court any single reference in the trial record that would justify a conclusion that the Trial Judge's remark was "casual" or "obviously humorous" (Petition, p. 9). The respondent has not referred to any part of the trial record to justify any such conclusion. He has not done so, because there is nothing in the trial record to indicate any humor. On the contrary, the following immediate reaction of the defense counsel to the Trial Judge's unfair comment demonstrates the exact opposite:

> "I have to again object to these remarks, much as I regret that I have to do it, your Honor" (125a).*

Respondent, unable to defend the Trial Judge's remark, argues that the Trial Judge cleared the

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* Figures followed by "a" refer to pages of appellant's appendix, Volume I of certified record.
Figures preceded by "App." refers to appendix to the petition.

record of any error by informing the jury in the charge that they were the exclusive judges of the facts (Resp. brief, p. 7).

Both this Court and the Court of Appeals for the Second Circuit have held that such comments in the charge to the jury lack a purgative effect. Thus, in *Quercia* v. *United States,* 289 U. S. 466, 472, Mr. Chief Justice Hughes said:

> "Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not guilty."

The Court of Appeals for the Second Circuit in *United States* v. *Brandt,* 196 F. 2d 653, 656, held that:

> "The government insists on the curative effect of the charge, in which the jury was admonished that its own view of the evidence controlled, citing the similar case of United States v. Aaron, 2 Cir., 190 F. 2d 144, certiorari denied Freidus v. United States, 342 U. S. 827. Such admonitions may offset brief or minor departures from strict judicial impartiality, but cannot be considered sufficient here".

The Court of Appeals for the First Circuit in *Crowe* v. *DiManno,* 225 F. 2d 652, 655, a civil case, followed the ruling in the *Quercia* and *Brandt* cases with this apt comment:

> "The cases cited above are both criminal. We have no doubt, however, that the principles enunciated in them apply as well to civil cases."

Petitioner does not doubt, either, that the basic principles of simple fairness in the conduct of jury trials apply to civil as well as criminal cases.

2.

The Court of Appeals held that it had "no idea that it (the Trial Judge's comment) made an impression on the jury which affected the outcome of the case" (App. 7). Accordingly, its failure to grant the petitioner a new trial was error.

The respondent in its brief in opposition to this petition does not challenge the position taken by petitioner and supported by the authorities, that a new trial should be granted unless it appears affirmatively and beyond doubt that the remark complained of did not, and could not have prejudiced the rights of a party litigant.

However, respondent has attempted to avoid the effect of this well-founded legal principle by reading into the opinion of the Court of Appeals something that is not there. Thus, respondent states:

> "The Court of Appeals accordingly quite properly ruled that the comments could not have 'made an impression on the jury which affected the outcome of the case' (App. 7)". (Resp. brief, p. 8)

Actually the Court of Appeals had said:

> "His casual, and obviously humorous, remark about not wanting to pay the money might better

> have been left unsaid, but we have no idea that it made an impression on the jury which affected the outcome of the case" (App. 7).

Consequently, the words "could not have" are respondent's words, making the conclusion reached respondent's conclusion and not the conclusion of the Court of Appeals.

Indeed, the Court of Appeals could not have had any "idea" as to the effects of the Trial Judge's unfair remark in the presence of the jury, because there is absolutely nothing in the trial record that would lead anyone to the conclusion that the remark *could not have* made an impression on the jury which affected the outcome of the case. The Court of Appeals was frank to state that it had no "idea" as to the effect of the remark. This being so, a new trial should have been granted. *McCandless* v. *United States,* 298 U. S. 342, 347; *Vicksburg & Meridian R. R.* v. *O'Brien,* 119 U. S. 99, 103.

3.

Petitioner claims that it was erroneous and contrary to English and American authorities, for the Trial Judge to charge the jury that any verdict for the plaintiff "will automatically be a verdict for $300,000".

Respondent in its brief appears to deny the fact that the Trial Judge instructed the jury that any verdict for the plaintiff "will automatically be a verdict for $300,000". Nowhere in respondent's brief is there any mention of the very language in the charge complained of by the petitioner. On the contrary, re-

spondent argues, "The Trial Judge at no time held, as petitioner implies, that plaintiff could recover the full amount of the policy if a part of the goods insured were not shipped" (Resp. brief, p. 9).

So that there may be no doubt about the fact that the Trial Judge charged the jury on the point just as petitioner claims, we quote here the entire pertinent paragraph from the Trial Judge's charge to the jury:

> "The jury will, therefore, retire and reach its verdict. It will be a verdict either for the plaintiff or for the defendant. If it is a verdict for the plaintiff, it will automatically be a verdict for $300,000 and interest, and the judge will compute the amount of interest" (146a).

In view of that clear-cut statement of the Trial Judge that any verdict for the plaintiff must be for $300,000 (the amount sued for) it is inconceivable how respondent can tell this Court that "The Trial Judge at no time held, as petitioner implies, that plaintiff could recover the full amount of the policy if a part of the goods insured were not shipped" (Resp. brief, p. 9).

By his instruction to the jury that any verdict for the plaintiff must "automatically be a verdict for $300,000" the Trial Judge foreclosed the jury from determining as a fact whether all of the insured goods had been put at risk. No other conclusion is possible, for if the jury had been permitted to find that less than all the insured goods had been loaded on the LCT, and thus placed at risk, the jury verdict of necessity would have had to be for less than $300,000.

CONCLUSION

By reason of the premises, a writ of certiorari should issue to review the decision of the Court of Appeals herein.

Dated: May 23, 1960.

Respectfully submitted,

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